real state of doubt, the prosecution has failed to satisfy the onus of proof which is upon it (see *Mat* v *PP* [2]). To my mind, the accused has succeeded in raising a reasonable doubt on the prosecution's story that she was in possession of the drugs. In the event, I do not have to consider the rebuttable presumptions raised under s 37(d) and (da) of the Dangerous Drugs Act 1952. Accordingly, I acquit her of the charge.

Order accordingly.

Solicitors: *Khairuddin & Associates.*

Reported by *PS Ranjan*

Public Prosecutor v Kamde bin Raspani

HIGH COURT (JOHORE BAHRU) – CRIMINAL TRIAL NO 17 OF 1984
ZAKARIA YATIM J
10 APRIL 1988

Criminal Procedure – Cautioned statements – Admissibility – Caution ambiguous in meaning – Recording of statements – Use of interpreter – Exact words of accused not recorded – Statements not interpreted to him after recording – Voluntariness of statements – Accused interrogated for long hours at night in breach of rules – Allegation by accused of assault of police – Burden on prosecution at close of case – Prima facie case

Evidence – Cautioned statements – Admissibility – Caution ambiguous in meaning – Recording of statements – Use of interpreter – Exact words of accused not recorded – Statements not interpreted to him after recording – Voluntariness of statements – Accused interrogated for long hours at night in breach of rules – Allegation by accused of assault by police – Evidence of accomplice – Need for corroboration – Circumstantial evidence

The accused was charged under the Dangerous Drugs Act 1952 with the offence of cultivating cannabis. The prosecution relied largely on two cautioned statements made by the accused and the evidence of one Sumari bin Saribu (PW11) who had been arrested near the scene of the crime. In his evidence, Sumari had named the accused.

The defence objected to the admissibility of the cautioned statements. The police inspector who administered the caution admitted that in the caution he administered, which was translated into simple Malay, there was no comma after the word 'tidak'. The inspector had experienced difficulty in understanding the accused because of the accused's Javanese accent and so he called another inspector to act as interpreter. The statements were recorded in Malay. The recording officer also admitted that he had recorded the words of the interpreter and not the words of the accused. He had read back the statements to the accused but they were not interpreted to the accused.

In addition, the accused had been subjected to long hours of interrogation. He was once interrogated for 17½ hours until the early hours of the morning in breach of the Police (Lock Up) Rules 1953 which provides that prisoners shall be locked up for the night by 6.30 pm and shall rise and be dressed by 6.30 am. The accused had also alleged that he had been beaten during interrogation and that he had fabricated his statement to avoid further beating. The police witnesses admitted that there was opportunity to beat the accused. Sumari too alleged that he had been assaulted by the police after his arrest and that the police had uttered threats to him.

Held, acquitting and discharging the accused: (1) For the statements to be admissible, the prosecution must prove beyond reasonable doubt that the statements were made voluntarily without any inducement, threat or promise. It is the duty of the prosecution to prove affirmatively to the satisfaction of the court that the statements were made voluntarily and not obtained by any improper means.

(2) Without the comma, the caution could mean two things. It could mean that what the accused said could be used in evidence or that it could not be used in evidence against him. Therefore, the caution itself was very ambiguous, especially so when the caution had to be translated into simple Malay for the accused.

(3) It was doubtful whether the statements were recorded in a proper manner. The words in the cautioned statements were not the words of the accused. Furthermore, the statements were not interpreted back to him. For this reason, the cautioned statements were inadmissible.

(4) The way the accused was interrogated was indeed unfair and the court must regard it as oppressive. In addition, there was a strong probability that the accused was assaulted after which he agreed to make a statement. The court had no hesitation in coming to the conclusion that the accused was put under tremendous physical and mental pressure in order to compel him to make the statements. The statements were inadmissible because the court was fully satisfied that the statements were not made voluntarily. The court was also satisfied that the statements were not made without coercion or threat.

(5) When the prosecution closed their case, there was no evidence at all to link the accused with the cultivation of the plants or with the exhibits. The only evidence was the evidence of Sumari. Assuming that he was not under pressure to give the evidence, he had been found and arrested at the scene and was therefore an accomplice and his evidence was not corroborated by anyone in the sense that the plants belonged to the accused or the plants were cultivated by the accused. Neither was there circumstantial evidence which pointed to the guilt of the accused.

(6) The prosecution, at the close of their case, need not prove their case beyond reasonable doubt. All that they needed to show was that there was some credible evidence to link the accused with the offence with which he was charged. There must be some evidence which is not inherently incredible. In this case, there was no evidence at all to link the accused with the cultivation of the plants or with the exhibits. There was therefore no prima facie case against the accused.

Cases referred to

1 *Dato Mokhtar bin Hashim* v *PP* [1983] 2 MLJ 232 (folld)
2 *PP* v *Singaran* Kedah Criminal Trial No 11 of 1974 (unreported) (folld)
3 *PP* v *Seman bin Misbah* Criminal Trial 4 of 1983 (unreported) (folld)
4 *PP* v *Akin Khan bin Abdul Khanan* [1987] 2 CLJ 244 (folld)
5 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (folld)

Legislation referred to
Criminal Procedure Code (FMS Cap 6) s 117
Dangerous Drugs Act 1952 ss 6B(1)(a), (3)
Police (Lock Up) Rules 1953 r 20

Cik Nor Afizah Hanum bte Mokhtar (Deputy Public Prosecutor) for the prosecution.
RK Menon for the accused.

Cur Adv Vult

Zakaria Yatim J: The accused was originally charged with trafficking in dangerous drugs, namely, 3,932g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952. At the commencement of the trial the learned deputy public prosecutor tendered an amended charge, which reads as follows:

> That you on 24 September 1980, did cultivate, on behalf of another person still at large, cannabis, at Kampung Parit Satu, Sanglang, Ayer Baloi, in the district of Pontian, in the state of Johor, and thereby you have committed an offence under s 6B(1)(a) and punishable under s 6B(3) of the Dangerous Drugs Act 1952.

The prosecution called 13 witnesses to prove their case. Briefly, the case for the prosecution is that on 24 September 1980, a police party led by Inspector Buang bin Mol (PW1) went to a place at Kampung Parit Satu, Sanglang, Ayer Baloi, and there laid an ambush. After waiting there for some time, the police party saw a male person, who was identified in court as Sumari bin Saribu (PW11) entering a 'belukar' where dried leaves were kept. When PW1 entered the 'belukar' he was opening a gunny sack. The police party arrested him and took the dried leaves, which they believed to be ganja. PW11 then led the police party through the 'belukar' to an open area about 100 feet from where he was arrested. The police found that the open area was grown with ganja plants. The police pulled out all the ganja plants and brought them together with the dried ganja leaves and PW11 to the Pontian police station. PW11 was then interrogated by the police. In his evidence in court, PW11 alleged that he was assaulted by the police and asked to 'press' the accused as the person responsible for the cultivation of the ganja plants. The other witnesses for the prosecution were formal witnesses to corroborate the evidence of the prosecution on the seizure of the dried ganja leaves and the ganja plants as well as the evidence on the arrest of PW11.

In the course of the prosecution case, the prosecution sought to tender two cautioned statements, purportedly made by the accused, as exhibits in support of the prosecution case. Mr Menon, counsel for the accused, objected to the statements being used as evidence at the trial. In view of the objection, the court ordered that a trial within a trial be held to determine whether the two statements were admissible as evidence.

For the statements to be admissible, the prosecution must prove beyond reasonable doubt that the statements were made voluntarily without any inducement, threat or promise (see *Dato Mokhtar bin Hashim* v *PP* [1] at pp 274 and 275). It is the duty of the prosecution to prove affirmatively to the satisfaction of the court that the statements were made voluntarily and not obtained by any improper means: *Public Prosecutor* v *Singaran*.[2]

The prosecution called Inspector Chan Yoke Meng, the officer who recorded the two cautioned statements of the accused; Inspector Abdul Mutalib, the officer who acted as interpreter when the statements were recorded; Inspector Kamaruddin, the investigation officer; and the magistrate who made the remand orders under s 117 of the Criminal Procedure Code. For the defence, the accused himself testified on oath. The other witnesses for the defence were Sumari bin Saribu, who gave evidence for the prosecution before the trial within a trial; and Mohd Noor bin Jadi, a relative of the accused. The defence made a serious allegation that the accused was assaulted by the police and was forced to make the statements. The prosecution recalled Inspector Chan, Inspector Kamaruddin as well as two other witnesses to rebut the defence allegation.

Before going into the question of whether the statements were voluntary or not, it is relevant to consider whether a proper caution had been given to the accused and whether the recording of the statements was done in a proper manner. Inspector Chan in his evidence admitted that in the caution he administered to the accused, there was no comma after the word 'tidak'. I agree with the learned judge in his ruling in *Public Prosecutor* v *Seman bin Misbah* [3] that without the comma the caution can mean two things. It can mean that what the accused said can be used in evidence or that it cannot be used in evidence against him. Therefore, the caution itself is very ambiguous. This is especially so when the caution had to be translated to the accused into simple Malay.

Apart from the administration of the caution itself, it is doubtful whether the statements were recorded in a proper manner. According to Inspector Chan, he had difficulty in understanding the accused because of the accused's Javanese accent. So he called Inspector Mutalib to act as interpreter. Inspector Chan told the court that he recorded the statements in Bahasa Malaysia. Under cross-examination, Inspector Chan admitted that what he typed in the statements were the words of Inspector Mutalib and not the words of the accused. He added that the statements were read back to the accused, but they were not interpreted back to the accused. In my opinion, the words in the cautioned statements were not the words of the accused. In the circumstances, it cannot be said that the statements were the accused's statements. Furthermore, the statements were not interpreted back to him. In *Public Prosecutor* v *Akin Khan bin Abdul Khanan*,[4] at p 246, Abdul Malek J decided that the cautioned statement was inadmissible on the grounds,

inter alia, that 'TPW1's admission that the words in the cautioned statement were not the accused's exact words, but words standardized by TPW1 into Malay as they went along'. The situation in that case is similar to that in the present case, and I agree with Abdul Malek J's decision.

I shall next consider the question of voluntariness. According to Inspector Kamaruddin, the accused was arrested on 10 January 1982. From that date until 13 January 1982, the accused was taken out of the lock-up for interrogations. At 3 pm on 13 January 1982, Inspector Kamaruddin already requested Inspector Chan to record the cautioned statement. During that short period, the accused was subject to long hours of interrogation. Under cross-examination, Inspector Kamaruddin admitted that on 11 January and 12 January, the accused was interrogated for 17½ hours until the early hours of the morning. The interrogations were carried out after 6.30 pm in violation of r 20 of the Police (Lock Up) Rules 1953 which states:

> Prisoners shall be locked up for the night by 6.30 pm and shall rise and be dressed by 6.30 am.

The way the accused was interrogated is indeed unfair and the court must regard it as oppressive.

Apart from the long hours of interrogation, there is the allegation of the accused that he was assaulted on two occasions during the interrogation. In his evidence he said two policemen in civilian clothes took him out of the lock up and brought him to a room. He said that both the policemen asked him to tell them about the ganja plants found in 1980. He said that he told them he did not know about it. According to the accused, the policemen then punched him twice in the chest. One of them then kicked him on the right hip until he was thrown off to the floor. Later when he got up, one policeman punched him in front and the other in the back. He told the court that the two policemen punched him continuously until he became unconscious. The next day at 7 pm two other policemen took him out of the lock up and brought him to a room. There, he said, he was whipped with a rubber whip. He said he could not stand the pain and was compelled to fabricate his own statement. He further said that if he had not been beaten by the police, he would not have given the statement to the police. According to him, he fabricated the statement in order to save his skin. He was threatened by the two policemen that if an officer asked him to make a statement, he had to give the statement, otherwise they would beat him again.

The police witnesses who were called by the prosecution to rebut the defence story, denied assaulting the accused. One witness, Inspector Samad bin Rasmani, however, admitted that the police had every opportunity to beat the accused. Another witness, Detective Constable Hussin bin Awang, also admitted that there was opportunity to beat the accused.

The accused's story that he was beaten during interrogations cannot be rejected just because the police witnesses denied beating him and just because the accused could not identify those who assaulted him. The accused was subject to vigorous cross-examination by the learned deputy public prosecutor and his story remained unshaken. The evidence of the accused that he was assaulted is consistent with the evidence of a witness called by the prosecution, namely, PW11, Sumari bin Saribu. PW11 told the court that after he was arrested, he was beaten by the police. He also said that the police threatened to distribute his children in different police stations. He said he was asked to admit that the ganja belonged to him. He did not admit and the police started to assault him. PW11 further stated in his evidence:

> The police said if I wanted to live he could show me a way, that I should press Kamde and to say that the things belonged to Kamde. He said if I did not press Kamde ... and then he punched me twice and pulled my nipple. The police said I had seven children. Police said he would distribute seven children to each police station to be investigated further. I was punched when I refused to cooperate. My hands were handcuffed at the back when the police punched me ... At that time I did press Kamde. I pressed Kamde because he asked me to do so. I have no ill feeling against Kamde. At that time I was too scared if he asked me to eat shit I would do so ... I was punched twice before I pressed Kamde ... I was scared the police would punch me harder. I signed my name after I was punched ... I was arrested on 24 September at 10 am. I was punched on different days. About two days after I was arrested, I signed. I was arrested morning. Next evening I was punched and then subsequent evening I signed. I signed my name about 3 pm ...

The learned deputy informed the court that she wanted to impeach the credit of PW11, but subsequently she decided not to do so.

So, it is the prosecution case that PW11 was beaten until he agreed to make a statement. PW11 was called by the defence to testify in the trial within a trial and he repeated the same story as he said earlier.

In my opinion, there is a strong probability that the accused was assaulted on 11 and 12 January 1982, after which he agreed to make a statement. By 13 January, the police were ready to record his statement. According to Inspector Kamaruddin, on 13 January 1982 at 3 pm, he already asked Inspector Chan to record a cautioned statement from the accused.

Having considered all the evidence in the trial within a trial, I have no hesitation in coming to the conclusion that the accused was put under tremendous physical and mental pressure in order to compel him to make the statements.

For the reasons I have just stated, I ruled that the two cautioned statements purported to be made by the accused were inadmissible because I was fully satisfied that the statements were not made voluntarily. I was also

satisfied that the statements were not made without coercion or threat.

When the prosecution closed their case, I find no evidence at all to link the accused with the cultivation of the ganja plants or with the exhibits. The only evidence is the evidence of PW11. In his evidence, PW11 said 'at that time I did press Kamde, I pressed Kamde because he (meaning the police) asked me to do so. At that time I was too scared. If he asked me to eat shit, I would do so'. That is the only evidence. Assuming that PW11 was not under pressure to give the evidence, the court has to bear in mind that PW11 was found and arrested at the scene, and he is, therefore, an accomplice. His evidence is not corroborated by anyone in the sense that the plants belonged to the accused or the plants were cultivated by the accused.

The learned deputy, in her submission, said that the prosecution was relying on circumstantial evidence in the present case. She said that after Sumari was arrested, he pointed at the accused's house, and there was also the close proximity between the accused's 'kebun' and the place where the ganja was planted. But in law, in order for the prosecution to succeed their case on the basis of circumstantial evidence, the prosecution must adduce circumstantial evidence which points to the guilt of the accused. In this case, there is no such evidence.

The learned deputy relying on the case of *Haw Tua Tau* v *PP* [5] rightly pointed out to the court that the prosecution, at the close of their case, need not prove the case beyond reasonable doubt. All they need to show is that there is some credible evidence to link the accused with the offence he is charged with. She has stated the law correctly. According to *Haw Tua Tau*,[5] there must be some evidence which is not inherently incredible. The important word is 'some evidence'. In this case there is no evidence at all to link the accused with the cultivation of ganja or with the exhibits. I, therefore, find no prima facie case against the accused. He is acquitted and discharged.

Order accordingly.

Solicitors: *RK Menon & Co.*

Reported by *PS Ranjan*

Public Prosecutor v Chong Boo See

HIGH COURT (PENANG) – CRIMINAL TRIAL NO 58-9-83
EDGAR JOSEPH JR J
5 NOVEMBER 1987

Criminal Procedure – Cautioned statement – Admissibility – Confession – Corroboration – Duty of counsel at end of prosecution case – Defence of accused – Criminal Procedure Code (FMS Cap 6), ss 73(b), 180, 182, 190, 197, 214(i) & 217

Criminal Law – Dangerous drugs – Trafficking in – Whether accused had possession of drugs – Cautioned statement – Dangerous Drugs Act 1952, ss 37(1)(a)(ii), 37A(i), 39A & 39B

The accused was charged with trafficking in dangerous drugs, ie morphine. The police raided a dwelling house where they arrested the accused. The police broke into the house when the accused would not let them in. The accused was then seen running out of the toilet where there was a fire. The police recovered two morphine blocks and partly burnt Chinese newspapers. A paper package containing a white powdery substance which was later identified as sodium bicarbonate, a substance which could be used for the purpose of converting morphine into heroin, was also recovered. At the trial, a trial within a trial was held to determine the admissibility of a cautioned statement. The cautioned statement was admitted and in it the accused stated that he was alone at the time of the police raid and that he had attempted to burn the morphine blocks when the police indicated that they wished to enter the house. The accused was called for his defence and in his defence he stated that he had told the police to wait while he looked for the key to open the house. The accused claimed that he had no knowledge of the two morphine blocks. Before the police entered the house, he claimed there was another man in the house who ran out of the house and escaped. The accused said he had gone to the toilet as he saw smoke coming from it.

Held, convicting the accused: (1) The onus was on the prosecution to prove the voluntariness of the cautioned statement beyond reasonable doubt. In this case the court was satisfied that the witnesses called by the prosecution during the trial within a trial were witnesses of truth. There were no grounds sufficient to persuade the court to exclude the cautioned statement.

(2) Although in principle it is possible for an accused person to be convicted on his confession standing alone provided the court is of the opinion that the incriminating parts thereof are true, in practice the court always looks for corroboration. In this case there was corroboration of the cautioned statement of the most cogent kind implicating the accused.

(3) At the close of the prosecution case, the court was of the opinion that the prosecution had tendered sufficient evidence which if unrebutted would have warranted the conviction of the accused under s 182(f) of the Criminal Procedure Code, and therefore indicated that the court did not wish to hear a submission of no case to answer. Nevertheless counsel for the accused formally submitted that there was no case to answer.

(4) The prosecution had adduced sufficient evidence which if unrebutted would warrant a conviction, irrespective of whether it was open to the court to assess the credibility of the prosecution witnesses at the close of the case for the prosecution.